STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

FRESHPICT FOODS, INC., and NICHOLAS LAND AND LEASING CO., Joint Employers, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 75-RC-49-R 4 ALRB NO. 4

DECISION AND ORDER
SETTING ASIDE ELECTION

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

Following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW), on October 31, 1975, an election by secret ballot was conducted on November 6, 1975, among the agricultural employees of Nicholas Land and Leasing Co. (Nicholas) and Freshpict Foods, Inc. (Freshpict) as joint employers. All of the employees of Freshpict and the regular employees of Nicholas voted unchallenged ballots in the election. The tally of these ballots showed that there were 16 votes for the UFW and 20 votes for no union. All employees in the harvesting crew employed on Nicholas's properties voted challenged ballots. Following a resolution of challenges by the Regional Director, the tally of these ballots showed that there were 14 votes for the UFW and 8 votes for no union. Combining the two groups gives a composite tally of 30 votes for the UFW and 28 votes for no union.

The Employer filed timely objections to the election. Based upon a factual stipulation of the parties, Investigative Hearing Examiner (IHE) Thomas Sobel, on August 15, 1977, issued his initial Decision in this matter, in which he found that Nicholas is not the Employer of the harvesting crew and recommended that the election be set aside as untimely, due to the fact that neither Freshpict alone, nor Freshpict and Nicholas jointly, were at or over 50 percent of peak employment at the time the petition was filed.

The UFW filed timely exceptions to the IHE's Decision and a brief in support thereof, and the Employer filed a response and supporting brief. The Board has considered the objections, the stipulation of the parties, the record, and the IHE's Decision in light of the exceptions and briefs and hereby affirms the rulings, findings, and conclusions of the Investigative Hearing Examiner to the extent consistent with this opinion and adopts his recommendation.

The UFW's sole exception to the IHE's Decision is that the issue of whether Nicholas is the Employer of the harvest crew was not properly before the Board. Although we agree with the UFW that the rule of Capitol National Bank v. Smith, 62 Cal.App.2d 328, is inapplicable to election objections before this agency, the IHE cited adequate additional grounds for considering and resolving the issue. We adopt his finding that, on the facts presented, Nicholas is not the Employer of the harvest crews and also his recommendation that the election must, therefore, be set aside as untimely. We decline to conclude whether the packing shed or labor association should properly be considered the Employer of the harvest crew, as it is unnecessary for us to resolve that issue here.

The election is set aside and the petition for certification dismissed.

Dated: January 27, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

FRESHPICT FOODS, INC.,
and
NICHOLAS LAND AND LEASING CO.,

Joint Employers,

Case No. 75-RC-49-R

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitioner.

Dennis Gladwell, Gibson, Dunn and Cruteher for Employers, Freshpict Foods, Inc. and Nicholas Land and Leasing Co.

Tom Dalzell, for Petitioner, United Farm Workers of America, AFL-CIO.

DECISION

THOMAS SOBEL, Investigative Hearing Examiner: This case has been assigned to me for decision upon a Stipulation of Facts entered into by Petitioner, United Farm Workers of America, AFL-CIO, (hereafter called Union) and Employers, Freshpict Foods, Inc. and Nicholas Land and Leasing Co. (hereafter called, respectively, Freshpict and Nicholas). By Order dated March 16, 1977, the Executive Secretary set for hearing the following issues:

1. Whether Nicholas Land and Leasing Company is the employer of the harvesting crew used by Nicholas Land and Leasing Company; and

2. Whether Freshpict Foods, Inc. and Nicholas Land and Leasing Company are joint employers.

With respect to the first objection, the Union apparently does not take a position on the merits, but insists that the issue was not properly raised by employers and should not have been set for hearing. Employers, on the other hand, argue that the harvesting crew employees are not employees of Nicholas. (Neither party contends that they are employees of Preshpict, except to the extent that Freshpict and Nicholas are, for the purposes of the Act, joint employers.) As to the second issue, the Union contends that Freshpict and Nicholas are
joint employers, while the employers maintain they are not.

On October 17, 1975 [1] the Union filed a Petition For Certification (75-RC-35-R) specifying Freshpict as the employer of a bargaining unit consisting of all of its employees located in Blythe,

[1] The Stipulation of Facts, Paragraph 24, fixes the filing date of this petition as October 17, 1976. Subsequent paragraphs similarly advance the date of events from 1975 to 1976. Paragraph 25 makes it clear that someone knew better although it rather impossibly has a petition filed on October 21, 1976 being withdrawn on October 29, 1975 These are not the only factual difficulties in the Stipulation. For example, the combined tally of ballots in Paragraph 28 indicates that 59 votes were cast: 30 for Union, 28 for No-union and one remaining challenged ballot. The total, however, of unchallenged ballots and challenged ballots resolved by the Regional Director indicates that 57 votes were cast. 1 am faced, therefore, with a Stipulation which is at times both self-contradictory as well as contradictory of the record. Without destroying the conclusiveness of the Stipulation as between the parties, I will take administrative notice of the contents of the Hearing Officer's Official File in order to avoid the factual impossibilities to which the Stipulation leads. I am not, therefore, finding facts contrary to the Stipulation, but resorting to other evidence in order to resolve ambiguities in the Stipulation itself. In light of the parties' references to other parts of the record (see Union brief, pp. 3-4; Employers' brief, pp. 7-8,) I cannot read the Stipulation to preclude me from otherwise relying upon it. Even if that intent were apparent, however, under the circumstances of this case, I would rely upon the record on the grounds that "a stipulation that only such evidence as shall be agreed upon by the parties shall be admissible will not be allowed to control the action of the court in the reception of other evidence or to determine the effect to be given to it." Berry v. Chaplin, 74 CA 2d 632, 658 (1946).

Blythe Mesa and Baja Grande Rancho (located in Arizona). [2] The crops specified in the petition Were row and flat crops. No citrus was included. This petition was withdrawn for two reasons: first, the Board agent determined that the employees working on certain properties attempted to be included in the unit were not Freshpict employees, but were, instead, the employees of the owner of that property, Nicholas Land and Leasing Co.; and second, with these employees excluded from the bargaining unit, Freshpict, considered alone, was not at peak.

Subsequently, on October 21, 1975, the Onion filed another Petition for Certification (75-RC-40-R) for the workers then harvesting citrus on the property of Nicholas. Nicholas, however, was not named as the employer; Corona College Heights Orange and Lemon Association, identified in the Stipulation as a packing shed operation, was. This petition, too, was withdrawn after the Board agent concluded that Corona was not the employer of the harvesting crew then on Nicholas' properties.

Finally, on October 31, 1975, the Union filed another Petition for Certification pursuant to which an election was held and from which flowed the present proceedings. This petition named Freshpict as the employer and requested a bargaining unit of all the agricultural employees of the employer at Blythe, Blythe Mesa and Baja Grande Rancho, specifically three classes of workers: "all new crop workers of Preshpict, the tractor drivers and irrigators of Nicholas and the harvest crews [then working on Nicholas properties] of the [San Gabriel

---

[1] The parties agree that the Board has no jurisdiction over employees Tn Arizona. See Bruce Church, 2 ALRB No. 38, p.9.

Valley Labor] Association." Stipulation Paragraph 26. The last named Association provided the harvesting crew working on Nicholas' properties to the Corona College Heights Association which was earlier named as the employer of that crew in 75-RC-40-R.

The Petition did not include Nicholas as an employer although it included two classes of employees then working on its properties, the steadies (tractor drivers and irrigators, and the harvesting crew. Prior to the election, however, Union orally amended the Petition to include Nicholas as a joint employer of Freshpict. The amendment being accepted, all employees of Freshpict and the Nicholas' steadies voted unchallenged ballots. The tally of these ballots was: 16 for the Union, 20 for No-union. The harvesting crew working on Nicholas' properties voted challenged ballots. The tally of these ballots was: 13 for the Union, 3 for No-union. Clearly, the ballots of these employees were outcome determinative. After the election, the Board agent resolved the challenges to the harvesting crew employees in favor of their eligibility (which followed from the decision to accept a unit which contained them), but there remained one outstanding challenge to an employee based upon his not being employed during the applicable payroll period. On November 25, 1975, the regional director issued his report on challenged ballots, recommending that the challenge be overruled and the ballot counted. The final tally reads: 30 for Union, 28 for No-union.

UNION'S THEORIES

After the election, employers filed objections alleging four different grounds for overturning it. As stated in Union's brief, the objections were that: (1) Nicholas and Freshpict are not joint employers; (2) the Petition for Certification was improperly amended;

(3) the election was untimely with respect to the ALRA's peak season requirement; and (4) the eligibility list was improperly maintained. Brief for Union, p.3. The Union argues that none of these objections, by its terms, purports to put into question the employment relation between the crew used by Nicholas and the company itself. According to the Union, the only issue properly before the Board is whether Nicholas and Freshpict are joint employers.

> The four election objections are set forth above. The first objection, dealing with the joint employer status of Nicholas and Freshpict, was set for hearing ... The remaining three objections were dismissed. The harvest crew issue which the Executive Secretary set for hearing is simply not one of the election objections.
>
> Likewise, the facts and law relied upon for the harvest crew objection are not included in the petition .and declaration. The facts, are [sic] set forth in the stipulation of the parties, are straightforward. There are three entities involved (Nicholas Land and Leasing, Corona College Heights, and the San Gabriel Valley Labor Association), one of which is the employer of the harvest crews within the meaning of the Labor Code. A comparison of the election objections with the factual stipulation shows that the facts contained in the stipulation do not even remotely resemble those contained in the election objections. Brief for Union, p.4.

Assuming, arguendo , that a comparison of the objections with the stipulation shows that the facts in the stipulation are not contained in the objection, the Stipulation remedies that. "The legal effect of a stipulation as to facts, it has been held, is to incorporate into the pleadings all the facts agreed upon as one of the allegations thereof ..." Capital National Bank v.Smith (Emphasis supplied) 62 CA 2d 328, 344 (1944) .[3] If the status of the harvesting crew were nor an issue

[3] The Union in its brief implicitly recognizes that the Stipulation raises the harvesting crew objection: "There are three entities involvec (Nicholas Land and Leasing, Corona College Heights, and the San Gabriel Valley Labor Association), one of which is the employer of the harvest crews within the meaning of the Labor Code. Brief, p. 4. Obviously, if the employer is not Nicholas, but one of the other entities, we are faced with a multi-employer, rather than a joint employer, unit problem.

before, it is now. While this sufficiently disposes of Union's contention, even without the stipulation the issue was properly before the Board. Although Union insists that the employers never raised the issue in their objection petition, it is misled to this position because it misconstrues the nature of employers' objections as well as the nature of the Executive Secretary's action in this case. In considering Union's contention several facts must be kept in mind: first, the Board agent concluded at the time of filing the first petition that Freshpict was not at peak; second, there was considerable confusion regarding who the employer of the harvesting crew was; third, the number of employees attributable to Nicholas was not sufficient, when added to the number of Freshpict's emplovees, to meet peak requirements. [4] It follows, then, that even if Freshpict and Nicholas be joint employers so that their employees may be combined for the purposes of determining peak, unless the members of the harvesting crew belong in the same unit (as either the employees of Nicholas, or of some third entity also considered a joint employer), the petition was untimely filed. Each of employers' initial objections properly

[4] In my earlier summary of facts in this case, I adverted to the fact that the Board agent concluded Freshpict was not at peak and to the obvious difficulty in determining the employer of the harvesting crew. Specific figures for the peak problem also appear in the Stipulation and I will here summarize them: Freshpict's peak was 160 employees; at the time of the election it had 44 employees, Stipulation Paragraph 2. Nicholas has 8-12 steady employees, its tractor drivers and irrigators. Stipulation Paragraph 3. Unless Nicholas had more employees than that maximum of 12, a unit consisting of the employees of both Freshpict and the Nicholas steadies has only 44+12, which is less than one-half of 160+12. Curiously, the stipulation contains no facts relative to the number of harvesting crew employees. I am assuming, without finding however, that the number *is* sufficient to bring a unit consisting of Freshpict and Nicholas to peak.

construed , goes to the peak question. It is true that the peak issue first appeared to turn on whether Nicholas and Freshpict were joint employers; but it does not follow that the Board is precluded from inquiring whether Nicholas is the employer of the harvesting crew. Whether the petition for a unit consisting of Nicholas and Freshpict employees was timely filed necessarily requires the Board to determine if the number of employees of Freshpict and Nicholas reflects 50% of their peak employment (assuming that Nicholas and Freshpict are joint employers). The two issues set for hearing by the Executive Secretary, therefore, are the ultimate facts in determining the peak objection for apparently only if the harvesting crew is employed by Nicholas and only if Nicholas, in turn is a joint employer with Freshpict, is Freshpict at peak. Contrary to Union's contention, none of employers' objections has been dismissed by prior Board action, they have simply been submerged in the inquiry presently before us .[5]

---

[5] This case was one of those which the early Board set for preliminary Hearing. It is clear from the Report on Preliminary Hearing that this case has always been construed as a peak case:

> The critical issue in this case is whether the regional office properly directed the election in a unit consisting of the employees of Freshpict Foods and Nicholas Land and Leasing as joint employers. If the answer to that question is negative, it is agreed that the petition should have been dismissed on grounds of lack of seasonal peak for Freshpict Foods. Joseph Grodin, Report on Preliminary Hearing, 75-RC-49-R.

Subsequent to that hearing, employers raised for the first time the possibility that the harvesting employees might not be considered Nicholas employees, even if Nicholas and Freshpict were joint employers. Although this is a different legal theory than the one regarding joint employer status, it goes to the question of peak which was always before the Board.

WHETHER NICHOLAS LAND AND LEASING COMPANY IS THE EMPLOYER OF THE HARVESTING CREW USED BY NICHOLAS LAND AND LEASING COMPANY

Nicholas owns over a thousand acres of citrus properties in the Blythe area on which only citrus products are grown. It employs 8-12 steady employees, all of whom are tractor drivers or irrigators. During the period relevant to our purposes, Nicholas engaged the services of Corona College Heights Orange and Lemon Association to pick its citrus crop. Corona is a packing shed operation which cleans, packs and ships citrus, but apparently does not pick it. In order to bring in the crop, Corona retained the services of the San Gabriel Valley Labor Association which harvested the citrus. Nicholas had no dealing with the Labor Association although it would adjust its irrigating schedules to accommodate the harvesters. Nicholas had never dealt with the Association prior to that crop year.

Employers argue that the absence of any contractual relationship between Nicholas and the Labor Association is conclusive on the issue whether Nicholas may be considered the employer of the harvesting crew supplied by the Labor Association:

> Nicholas only contracted with Corona College Heights. Not only did it never have any business relationship with the Association, it had never heard of or dealt with the Association prior to its business arrangements with Corona College Heights. This fact alone would drop Nicholas without the scope of the analysis in Kotchevar Brothers, which explicitly stated that a farmer must contract with the harvest association before it can be held to be the employer of the association's harvesting crews. Brief for Employers, p.3.

I have searched Kotchevar in vain for an explicit statement that a farmer must contract with a harvest association before he can be considered the employer of the association's crews. Not only do I not find such a statement in Kotchevar, but also I do not read the Act as making the question of who is an agricultural employer turn on privity. It is not the nature of the legal relationship between a harvest association and a farmer which makes the association an employer, but the nature of the functions performed by the association and the relationship of it, in turn, to agricultural employees which are determinative. Labor Code §1140.4(c). See also, Napa Valley Vineyards, 3 ALRB No. 22,pp. 11-12.

The parties have further stipulated that it is Corona College Heights which sets the picking schedules for the citrus and which is responsible for quality control. A field superintendent from Corona determines what rows shall be picked and brings to the attention of the Labor Association's foremen any picking techniques or conditions which adversely affect the quality of the harvest Neither Freshpict nor Nicholas engage in the setting of picking schedules, in supervision of the picking, or in regulation of the quality of work performed.

The Labor Association sets its own wages, hours, premiums, and otherwise controls all working conditions. It has its own health and welfare plan and its own pension plan. It furnishes ail the equipment used on the job, such as tractors, ladders and forklifts and assumes the responsibility of transporting workers to and from the job. It determines the type of workers required and selects how many are needed, sending its own foremen and supervisors with them. Finally, it pays the crews directly and is later reimbursed by Corona College Heights.

On the basis of the facts set out above, I conclude that Nicholas is not the employer of the harvesting crew. I, therefore, recommend that this election be set aside as untimely .[6]

As noted above, the Labor Association provides not only labor, but also equipment—tractors, ladders and forklifts—for the harvest. The supply of equipment was a critical factor in both Kotehevar and in Cardinal Distributing Co., 3 ALRB No. 22, and the variety of equipment provided in Kotchevar is apparently of the sane order as that supplied by the Labor Association in this case. See Cardinal Distributing Co., fn. 4, p. 3. While the fact of different pay and supervision for the harvesting crew is not itself determinative, see TMY Farms, 2 ALRB No. 58, where the supplier of labor "determines the terms and conditions of workers employment ... [it] best serves the interest of the workers to negotiate directly with the company as their employer." Napa Valley Vineyards, 3 ALRB No. 22, p. 12. "It is the company which determines the day-to-day operations on the land and has the most immediate control over the workers and their working conditions. The all-inclusive functions of the company indicate it was hired to exercise its own initiative, judgment and foresight ... Finally, in considering the company's actual relationship to the workers, the record is clear that the company has the authority to hire and fire them and their daily work assignments are determined and supervised by the company." Ibid. ,pp 11-12 [7]

[6] A determination that the harvesting crew was not the employees of Nicholas moots the question of the relationship between Nicholas and Freshpict.

[7] *I* recognize that in Napa the Board finds a "land management group" to be an agricultural employer on the basis of a more ample record than that made by present parties. I do not rely .on Napa to find the Labor Association a land management group, but rather to find that it possesses enough of the indicia of one kind of agricultural employer to be considered one in its own right.

There is much that this record does not contain, notably, the nature of the fee arrangements between the Labor Association and Nicholas or Corona. However, the scantiness of the record only throws into relief those facts which have been presented and it is on the basis of these that I conclude Nicholas is not the employer of the harvesting crews provided by the Labor Association. DATED: August 15, 1977

Respectfully submitted,

THOMAS SOBEL

Investigative Hearing Examiner